TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Rule Involved	3
Statement of the Case	3
A. *Background Facts*	3
B. *Ragano I*	8
C. *Ragano II*	9
Reasons for Granting the Writ	12
Conclusion	29

TABLE OF AUTHORITIES

CASES:

Ashe v. *Swenson*, 397 U.S. 436 (1970) 19, 20, 21, 23
Ball v. *United States*, 163 U.S. 662 (1896) 17
Blackledge v. *Perry*, — U.S. —, 94 S.Ct. 2098 (1974) .. 26
Bryan v. *United States*, 388 U.S. 552 (1950) 17
Connelly v. *Director of Public Prosecutions*, (1964) A.C. 1254 25
Forman v. *United States*, 361 U.S. 416 (1960) 17
Glasser v. *United States*, 315 U.S. 60 (1942) 3
Green v. *United States*, 355 U.S. 184 (1957) 15, 18, 19, 20, 21
Leggroan v. *Smith*, 498 F.2d 168 (10th Cir. 1974) ... 17
State of Louisiana ex rel. Francis v. *Resweber*, 329 U.S. 459 (1947) 17
Stroud v. *United States*, 251 U.S. 15 (1919) 17

Page

Trono v. *United States*, 199 U.S. 521 (1905) ..18, 19, 20, 21
Thomas v. *United States*, 450 F.2d 317 (5th Cir. 1971), *cert. denied*, 409 U.S. 859 (1972) 17
Time, Inc. v. *Ragano*, 427 F.2d 219 (5th Cir. 1970) ... 3
United States ex rel. Betts v. *County Court for LaCross County*, 496 F.2d 1156 (7th Cir. 1974) 17
United States v. *Jasso*, 442 F.2d 1054 (5th Cir.), *cert. denied*, 404 U.S. 845 (1971) 17
United States v. *Lodwick*, 410 F.2d 1202 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969) 16
United States v. *Newman*, 468 F.2d 791 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973) 16
United States v. *Panzavecchia*, 446 F.2d 1293 (5th Cir.), *cert. denied*, 404 U.S. 996 (1971) 17
United States v. *Ragano*, 520 F.2d 1191 (5th Cir. 1975) 2
United States v. *Ragano*, 476 F.2d 410 (5th Cir. 1973).. 1, 8
United States v. *Rosenthal*, 454 F.2d 1252 (2nd Cir.), *cert. denied*, 406 U.S. 931 (1972) 16
United States v. *Smith*, 470 F.2d 1299 (5th Cir. 1973).. 17
United States v. *Smith*, 335 F.2d 898 (7th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965) 14
United States v. *Stapleton*, 494 F.2d 1269 (9th Cir. 1974) 17
United States v. *Tateo*, 377 U.S. 463 (1964) 17

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

Constitution of the United States, Amendment V 3
Federal Rule of Criminal Procedure, Rule 29(a) 3
18 U.S.C. § 371 9
18 U.S.C. § 3161(d) 26
26 U.S.C. § 7201 .....10, 13, 15, 16
26 U.S.C. § 7206(1) 9, 10, 15, 16
28 U.S.C. § 1254(1) 2
Cal. Pen. Code § 654 (West Supp. 1974) 25
Ill. Rev. Stat. c. 38, §§ 3-3, 3-4(b)(1) (1974) 25

Page

MISCELLANEOUS:

R. Arguile, Criminal Procedure (1969) 24

G. Bower, The Doctrine of Res Judicata (2nd ed. A. Turner 1969) 24

Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 Cal. L. Rev. 391 (1970) 23

Note, *Twice in Jeopardy*, 75, Yale L.J. 262 (1965) ...24-25

ABA Minimum Standards for Criminal Justice, Joinder and Severance 1.1, 1.3 (Approved Draft 1968) 24

Final Report of the National Commission on the Reform of Federal Criminal Laws: A Proposed New Federal Criminal Code §§ 703-706 (1971) .. 24

Model Penal Code § 1.07(2) (Proposed Official Draft 1962) 24

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FRANK RAGANO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, FRANK RAGANO, by and through his undersigned attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Ragano (Ragano I)* is reported at 476 F.2d 410 (5th Cir. 1973), and the opinion of the United States Court of Appeals for

the Fifth Circuit in *United States* v. *Ragano (Ragano II)* is reported at 520 F.2d 1191 (5th Cir. 1975). *Ragano I* is reprinted in App. A, pp. 1a-17a, *infra,* and *Ragano II* is reprinted in App. B, pp. 18a-45a, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in *Ragano II* was entered on October 14, 1975. It is reprinted in App. C, p. 46a, *infra.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the Double Jeopardy Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

A. Whether Ragano's prior acquittal on original Count I for income tax evasion barred the subsequent prosecution for income tax evasion and for the lesser included offenses of making false declarations in his 1966 and 1968 income tax returns.

B. Whether, by successfully appealing his conviction under Count III of the original indictment, Ragano consented only to be Retried under the particular theory and particular factual characterizations that underlay the appealed-from conviction.

C. Whether the "same transaction" or "same criminal episode" test for double jeopardy barred the government from reprosecuting Ragano under a different legal theory.

II. Whether the Due Process Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

III. Whether the District Court Erred in Denying Ragano's Motion for a Directed Judgment of Acquittal.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution which, in pertinent part, provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb . . .", the Due Process Clause of the Fifth Amendment to the United States Constitution which, in pertinent part, provides that no person may "be deprived of life, liberty, or property, without due process of law . . . ," and Rule 29(a) of the Federal Rules of Criminal Procedure which, in pertinent part, provides:

> The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficint to sustain a conviction of such offense or offenses.

STATEMENT OF THE CASE

A. Background Facts

The Petitioner, FRANK RAGANO, is a prominent, albeit controversial, *cf. Time, Inc.* v. *Ragano,* 427 F.2d 219 (5th Cir. 1970), Florida attorney who, in the past, has engaged primarily in the practice of criminal law. In the present case, the facts are substantially uncontradicted and have been set out, in differing extents, in both Fifth Circuit decisions. For a proper consideration of the issues raised in this Petiton, however, the critical historical facts have been set forth below in the view most favorable to the Government. *See Glasser* v. *United States,* 315 U.S. 60 (1942).

In 1964 or 1965, co-Defendant, S. A. Rizzo, (Rizzo), an acquaintance of Ragano's, sought his assistance in

obtaining a $5,000,000.00 loan from the Teamsters Union Pension Fund. Rizzo wanted the money to buy and to develop a large tract of land north of Miami, land that he could purchase at a very favorable price because he knew the owner, Mr. Ives, and had known him for years. Ragano agreed to assist Rizzo in obtaining financing for the project and, in the course of this assistance, Ragano traveled to Chicago on numerous occasions to discuss the proposed loan with trustees and other officials of the Pension Fund; in all probability, these discussions involved and included James Hoffa, though Ragano did not formally represent Rizzo nor did he appear on Rizzo's behalf at any meeting at which the loan was officially considered.

The loan application was made on Rizzo's behalf on February 9, 1965. A week later, on February 16, 1965, the trustees of the Pension Fund voted to approve the application. On March 9, 1965, a commitment letter was issued. The loan was later consummated by Rizzo's execution of a promissory note and mortgage. The $5,000,000.00 loan allocated its proceeds as $3,500,000.00 for the purchase of the land, $1,000,000.00 for construction and improvements and $500,000.00 for expenses, including commissions on the loan.

On January 29, 1965, articles of incorporation had been issued to Two Seasons, Inc., a Florida corporation, organized for the purpose of acquiring, holding, and developing real estate. On February 9, the date on which the loan application was formally submitted, the traditional dummy incorporators of Two Seasons met for the purpose of electing Rizzo as president of the company and chairman of its Board of Directors. All fifty shares of capital stock in Two Seasons were issued jointly to Rizzo and to his wife, who was also an officer

BLEED THROUGH

and director of the company. On June 5, 1965, the property purchased with the loan proceeds was transferred from Rizzo to Two Seasons.

On May 12, 1965, Ragano received $15,000.00 from Two Seasons, charged to its "Acquisition Costs" account. Beginning on November 15, 1965, and continuing through 1967, Ragano received from Two Seasons sums in amounts ranging between $200.00 and $30,000.00. These amounts were treated as loans on the books of the corporation, but they were neither secured nor evidenced by promissory notes and bore no interest. Nor did Ragano list any of these loans as liabilities in his financial statements.[1]

On January 3, 1967, certificates representing 20 shares of Rizzo's stock in Two Seasons, a 40% interest, were cancelled and new certificates in the same amount were issued to Ragano. On the same date, Ragano executed an unsecured, non-interest bearing, demand note in the amount of $40,000.00 payable to the Rizzos. In March, 1967, but as of January 3, 1967, Ragano executed a financial statement in connection with a loan application at the County National Bank of Miami Beach. That statement listed as assets the 20 shares of Two Seasons stock, valued at $2,288,000.00; it did not, however, list as liabilities either the $50,000.00 note to Rizzo or the loans from Two Seasons.

From about the time of Rizzo's loan application, Ragano began to procure a number of loans from the Central Bank of Tampa, where he had been previously

[1] The total of the loans was $90,550.00. However, $30,000.00 of this amount was eventually transferred on the company's books to the "Legal Expense and Land Acquisition Costs" account, leaving a loan balance of $60,550.00 at the end of 1967.

a customer. At the beginning of 1965, he had one loan from this bank with a then outstanding balance of $16,500.00. Between February, 1965, and October, 1967, Ragano obtained eight additional loans in face amounts varying between $2,500.00 and $12,500.00. Interest was paid on each of these nine loans through September, 1967; no payments of principal were made on any of the loans after September, 1965, except for payments on one relatively small loan and three payments totalling $1,755.45 on two of the other eight loans. Sometime in 1967 or 1968, Ragano delivered 10 shares of the Two Seasons stock to the bank for the purpose of redelivery to such person as might be designated at the time the loans should be repaid. As of August, 1968, when all of the loans were paid in full by a check drawn on a savings and loan institution and sent to the bank by Rizzo, the outstanding balance was $51,108.12. The 10 shares were delivered, in accordance with the instructions, to Rizzo's agent.

On November 11, 1966, Ragano borrowed $25,000.00 from the County National Bank of North Miami Beach. This loan was later renewed, and still later combined with a second loan in the amount of $30,000.00 obtained on March 15, 1967. On December 6, 1967, Ragano pledged the remaining 10 shares of Two Seasons stock to secure payment of the combined loans. On January 3, 1968, a third loan of $30,000.00 was granted by the bank, nominally to Assured Home Improvement Co. The loan was guaranteed by Ragano and was secured by the same 10 shares of Two Seasons stock that he had used as security for the original two loans. The loan proceeds were turned over to Ragano. On April 18, 1968, the total balance of $68,364.08 was paid by a check from Two Seasons and the stock was delivered to Rizzo.

BLEED THROUGH

The 20 shares of Two Seasons had not been listed in Ragano's name during the full period between their Formal transfer to him in January, 1967, and the date in 1968 when Rizzo retrieved them from the banks. The certificate representing the shares was cancelled on March 24, 1967, and those shares were reissued to Rizzo, making him, once again, the sole record shareholder of Two Seasons. On November 6, 1967, the shares were again reissued to Ragano, this time in the form of two certificates representing 10 shares each; this change made it possible to put up some of the shares as collateral at each of the two banks.

On January 2, 1968, one day before Ragano obtained the last of the bank loans, he and the Rizzos executed a Stockholders Agreement providing that, if any shareholder should pledge his stock as security for indebtedness and that indebtedness came into default, the remaining shareholders would have the right to pay the obligations for which any such shares were pledged and would "become the owner thereof free and clear of any claim of ownership by the other stockholders or stockholder . . . ."

On January 12, 1968, Ragano executed a handwritten codicil to the agreement in which he assigned the 20 shares to Rizzo "in consideration for the said S. A. Rizzo assuming the present indebtedness of the undersigned to the Central National Bank of Tampa, Florida, and the County Bank of North Miami Beach, Florida, and also holding the undersigned harmless and no longer indebted to the said corporation (Two Seasons) for loans made by the said corporation to the undersigned". No mention was made in the codicil of any note or notes executed by Ragano in Rizzo's favor.

The corporate and other indebtedness of Ragano assumed by Rizzo in January, 1968, amounted to a total of one hundred eighty thousand twenty-two dollars and twenty cents ($180,022.20).

B. Ragano I

In *United States* v. *Ragano, (Ragano I),* 476 F.2d 410 (5th Cir. 1973), Ragano was charged in a three-count indictment with violating the federal income tax criminal penalty statutes. Specifically, Ragano was charged with (i) attempting to evade taxes due and owing for the calendar year 1967, in violation of 26 U.S.C. § 7201,[2] (ii) making a false declaration in his 1967 joint income tax return, in violation of 26 U.S.C. § 7206(1),[3] and (iii) making a false declaration in his 1968 joint income tax return, in violation of 26 U.S.C. § 7206(1).

In this initial prosecution, the Government contended, and argued to the trial court and to the jury, that the stock transfers in question were, indeed, *bona fide* transactions, the tax consequences of which Ragano

---

[2] 26 U.S.C. § 7201 declares:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[3] 26 U.S.C. § 7206(1) declares that any person who

> [w]illfully makes and subscribes any return, statement or other document, which contains or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> • • • • • • • • • • •
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000. or imprisoned not more than 3 years, or both, together with the costs of prosecution.

BLEED THROUGH

had failed to report correctly. The thrust of the Government's case was that Ragano had in 1967 received the stock as ordinary income as a finder's or brokerage fee, had failed to report it as such in his income tax return for 1967, and had mistreated the proceeds of the sale of the stock in his 1968 income tax return by claiming a capital gain. At no time did the Government contend that the stock transactions were anything other than ordinary, *bona fide* transfers. The sole question was whether Ragano had, with criminal intent, failed to report the stock as ordinary income.

The jury aquitted Ragano on *both* counts relating to 1967, but it convicted him under Count III of making a false declaration in his 1968 joint income tax return, in violation of 26 U.S.C. § 7206(1). On appeal, the Fifth Circuit reversed and remanded "the cause" for a new trial, holding that certain trial errors had deprived him of a fair trial.

Ragano II

The retrial on original Count III was set for July 9, 1973, but, at the request of Ragano, it was reset for the week commencing August 6, 1973. On August 2, 1973, four days before the scheduled retrial, the federal grand jury returned a superseding six-count indictment that charged Ragano with (i) conspiring with one S. A. Rizzo to defraud the United States in the collection of income taxes owed by Ragano for the years 1966 and 1968, in violation of 18 U.S.C. § 371,[4]

[4] 18 U.S.C. § 371 declares:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(ii) attempting to evade taxes due and owing for the calendar year 1966, in violation of 26 U.S.C. § 7201(1), (iii) making a false declaration in his 1966 joint income tax return, in violation of 26 U.S.C. § 7206(1), (iv) attempting to evade taxes due and owing for the calendar year 1968, in violation of 26 U.S.C. § 7201, and (v) making a false declaration in his 1968 joint income tax return, in violation of 26 U.S.C. § 7206(1).

The District Court denied Ragano's motion to dismiss the superseding indictment, but it severed the trial of Co-Defendant S. A. Rizzo. Upon retrial, a jury convicted Ragano on all five counts. Ragano's post-trial motions for a new trial, for a directed judgment of acquittal, and to dismiss the superseding indictment were all denied, and Ragano was sentenced to five years' imprisonment on Counts I, II, and IV, and to three years' imprisonment on Counts III and V, with the sentences on Counts II through V to run concurrent with that on Count I. Execution of the sentence was suspended, and Ragano was placed on three years' probation.

In this subsequent prosecution, the Government abandoned its earlier contention that the stock transactions were *bona fide* and, instead, rehabilitated its prosecution by arguing that Ragano and Rizzo had engaged in a series of *sham* stock transactions, conspiring together to disguise the ordinary income nature of the money in question by these transactions. Yet this second "theory" was nothing new to the Government. As the Government pointed out in its "Memorandum in Response to Defendant Ragano's Motion to Dismiss":

> Undersigned counsel had always been critical of the theory of the case as previously tried, and has

BLEED THROUGH

> expressly disassociated himself from it in the course of the appeal . . . . Upon receiving the assignment, counsel reviewed the entire evidence and consulted with investigators with a view to finding charges that would enable the Government to present the evidence on retrial in the most intelligible manner. A determination was made to seek a new indictment *in substantially the form originally recommended by the Internal Revenue Service* (except for the omission of any charge having to do with offenses committed in the filing of the 1967 return), and authorization was sought from designated officers of the department of justice.

Government Memorandum in Response to Defendant Ragano's Motion to Dismiss at 3-4 (emphasis added). Additionally, in that same Memorandum, the Government also stated: "It is also, it should be observed, *the theory on which the Internal Revenue Service had urged that the case be presented . . . .*" *Id.* at 7.

Thus, the Government's own memorandum makes clear that, at the time of the initial prosecution of Ragano, the Government was fully aware of the "sham transaction" theory and deliberately elected not to prosecute under that theory Rather, the Government put aside that theory and chose to prosecute Ragano under the "bona fide stock transfer" theory. Only after it had failed to convict Ragano on two of the three counts, and had lost its conviction on the third count on appeal, did the Government resurrect its alternative theory, the one that the IRS agents had originally recommended as the basis of prosecution.

Appealing his conviction from this second, "sham transaction" trial, Ragano argued that the retrial under the superseding indictment violated his rights

under the Double Jeopardy Clause, that the Government's prior advocacy of the *bona fide* transaction theory entitled him to a directed verdict of acquittal under the *sham* transaction theory, and that certain trial errors were prejudicial. The Fifth Circuit affirmed this conviction. *United States* v. *Ragano,* 520 F.2d 1191 (5th Cir. 1975).

Ragano filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc,* which was denied, and he now files this his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The Order denying his Petition for Rehearing and Suggestion for Rehearing *En Banc* is reprinted in App. D, p. 47a, *infra.*

REASONS FOR GRANTING THE WRIT

The instant case is unique in several respects, but three points are critical to this Court's analysis:

First, after a full investigation, the Government *elected* in the original three-count indictment to prosecute Ragano in connection with the $180,022.20 on the theory that, although the stock transactions were indeed valid, he had not treated their tax consequences correctly. Hence, it must be assumed that the Government decided that the public interest would best be served, and that its chances of obtaining convictions were best, by proceeding under this theory.

Second, the Government *lost* two of the three counts on which it proceeded, and it was required by the Fifth Circuit, to afford Ragano a new trial on the third count because of multiple trial errors.

Third, instead of retrying Ragano on original Count III which it concededly could have done, the Govern-

BLEED THROUGH

ment reindicted him *on a new theory of prosecution that charged that the stock transactions were, in fact, a sham.* Thus, in the superseding indictment the Government made a 180 degree turn in its characterization of the transactions in question. In *Ragano I,* the stock transactions were concededly valid; in *Ragano II,* they were a "sham".

I. The Double Jeopardy Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

A. Ragano's Prior Acquittal On Original Count I For Income Tax Evasion Barred The Subsequent Prosecution For Income Tax Evasion And For The Lesser Included Offenses Of Making False Declarations In His 1966 And 1968 Income Tax Returns.

Section 7201, 26 U.S.C. § 7201, declares:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

In Count I of the original indictment, Ragano was charged with violating Section 7201 with respect to the calendar year 1967. The jury found him not guilty. Thus, at the first trial Ragano was acquitted of attempting *in any manner* to evade or defeat *any tax* due and owing on the alleged finder's fee. This "Count" was the sole tax evasion count in the original indictment. In the superseding indictment, Ragano was charged with, and was convicted of, violating Section 7201 in

1966 and 1968. This reindictment and subsequent conviction is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The critical legal point to be remembered throughout this discussion is *not* that each taxable year constitutes a separate violation; that rule is so well-settled as to be axiomatic. *See, e.g., United States* v. *Smith,* 335 F.2d 898 (7th Cir. 1964), *cert. denied,* 379 U.S. 989 (1965). Rather, the critical point here is that, in both prosecutions, the Government was prosecuting Ragano for attempting to evade the same tax on the same fee, the same dollars. All that changed was the Government's characterization of the manner of attempted evasion.

In the first prosecution, the Government charged that Ragano attempted to evade the tax on the alleged finder's fee when he received the shares of Two Seasons stock in 1967. In the second prosecution, the Government changed only its theory as to the *manner* by which Ragano allegedly attempted to evade the proper tax on the same alleged finder's fee: again, the Government charged that Ragano had attempted to evade the proper tax on the alleged finder's fee, but it proceeded on the theory that the various loans, fees, and stock transfers were merely sham transactions designed to camouflage the receipt of the alleged finder's fee. Thus, in both prosecutions the Government sought to prove that Ragano had attempted to evade ordinary income tax on the alleged finder's fee: all that changed was the method or manner employed by Ragano in the alleged attempt. But Ragano had already, in the first prosecution, been acquitted of evading tax on this amount "in any manner." That acquittal bars all subsequent prosecutions for any attempt to evade the proper tax on the alleged

BLEED THROUGH

finder's fee, and it also precludes prosecution for all lesser included offenses arising out of the alleged attempt.

The law is perfectly clear that, had Ragano been *convicted* under original Count I of attempting to evade this tax in violation of Section 7201, the Government would have been barred from reprosecuting him for attempting to evade the proper tax on the same alleged fee, but accomplished in a different manner. Yet, the Double Jeopardy Clause applies not only to reprosecutions following convictions of the same offense, but also to reprosecutions following acquittals. *See, e.g., Green* v. *United States,* 355 U.S. 184 (1957). Hence, having been acquitted of attempting to evade "in any manner" the proper tax on the alleged finder's fee, Ragano was immunized from further prosecution under Section 7201, regardless of the manner of evasion charged by the Government. Having failed once to establish attempted evasion of tax on particular income, the Government is precluded by the Double Jeopardy Clause from reprosecuting Ragano for attempting to evade the same tax on the same income but in a different manner. Otherwise, with respect to criminal income tax prosecutions under Section 7201, the essential protections of the Double Jeopardy Clause become meaningless.

Beause the 1966 and 1968 convictions under Section 7201 are barred by the prohibitions of the Double Jeopardy Clause, so also are the 1966 and 1968[5] con-

[5] Although, at first blush, the Double Jeopardy bar appears unavailable for the count alleging a violation of Section 7206(1) for the year 1968 (since that is the same statute and same year for which Ragano was convicted and subsequently won a new trial), such is not the case. Again, the critical point to be remembered

victions under Section 7206(1) barred. The law is clear that Section 7206(1) describes a lesser included offense of Section 7201, *see, e.g., United States* v. *Lodwick,* 410 F.2d 1202 (8th Cir.) *cert. denied,* 396 U.S. 841 (1969), and convictions of lesser included tax offenses must be vacated where the defendant has also been convicted of the greater tax offense. *See, e.g., United States* v. *Newman,* 468 F.2d 791 (5th Cir. 1972), *cert. denied,* 411 U.S. 905 (1973); *see also United States* v. *Rosenthal,* 454 F.2d 1252 (2nd Cir.), *cert. denied,* 406 U.S. 931 (1972). Hence, since Ragano's reprosecution under Section 7201 for 1966 and 1968 is barred, so also is his prosecution for those years for an offense included within Section 7201. The conviction under the conspiracy count is also barred because it flows from the Government's new, contrary characterization and theory of Ragano's alleged attempt to evade the proper tax due on the alleged finder's fee, and this contrary characterization of the Government's theory, as the next two subsections of this Petition explain, violated Ragano's Double Jeopardy Clause rights in a slightly different way.

---

is that, in *Ragano II,* the Government rehabilitated its prosecution of Ragano by characterizing the stock transfer transactions as a "sham." Thus, in *Ragano I,* the alleged false statement was the cost basis of the Two Seasons, Inc., shares. In *Ragano II,* however, the alleged false statement was Ragano's alleged failure to include in his 1968 tax return a portion of the same alleged finder's fee. But this alleged finder's fee was the same fee for which Ragano had been tried, and acquitted, in *Ragano I.* Accordingly, the Double Jeopardy Clause barred Ragano's retrial for violation of Section 7206(1) for the year 1968 under the Government's subsequent recharacterized theory.

BLEED THROUGH

B. By Successfully Appealing His Conviction Under Count III of the Original Indictment, Ragano Consented Only To Be Retried Under the Particular Theory and Particular Factual Characterizations That Underlay the Appealed-From Conviction.

Although the Double Jeopardy Clause declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," the courts have developed a well-recognized exception to that rule: a criminal defendant who successfully appeals his conviction has, in effect, waived his Double Jeopardy defense by winning a new trial. "[A] defendant who appeals and is found entitled to a new trial has waived his right to claim double jeopardy at the second trial." *United States* v. *Stapleton,* 494 F.2d 1269, 1270 (9th Cir. 1974). *See also United States* v. *Tateo,* 377 U.S. 463 (1964); *Forman* v. *United States,* 361 U.S. 416 (1960); *Bryan* v. *United States,* 338 U.S. 552 (1950); *Stroud* v. *United States,* 251 U.S. 15 (1919); *Ball* v. *United States,* 163 U.S. 662 (1896); *Leggroan* v. *Smith,* 498 F.2d 168 (10th Cir. 1974); *United States ex rel. Betts* v. *County Court for LaCrosse County,* 496 F.2d 1156 (7th Cir. 1974); *United States* v. *Smith,* 470 F.2d 1299 (5th Cir. 1973); *Thomas* v. *United States,* 450 F.2d 317 (5th Cir. 1971), *cert. denied,* 409 U.S. 859 (1972); *United States* v. *Panzavecchia,* 446 F.2d 1293 (5th Cir.), *cert. denied,* 404 U.S. 966 (1971); *United States* v. *Jasso,* 442 F.2d 1054 (5th Cir.), *cert. denied,* 404 U.S. 845 (1971); *cf. State of Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947).

Early court decisions held that the effect of the request for, and the winning of, a new trial wiped the slate clean for both defense and prosecution. The

zenith of this view came with this Court's decision in *Trono* v. *United States,* 199 U.S. 521 (1905). There, the defendants had been convicted of assault but had been acquitted of murder in the first degree. On appeal, they were convicted of murder in the second degree.[6] Instead of their original six month sentences, they were sentenced to eight years and fourteen years. Rejecting their plea that the Double Jeopardy Clause prohibited such a reopening of the case, the Supreme Court declared:

> In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been. The accused, by his own action, has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former

---

[6] Under "peculiar local procedures modeled upon pre-existing Spanish practices," *Green* v. *United States,* 355 U.S. 184, 195 (1957), the Philippine Supreme Court was empowered to review both facts and law and to substitute its findings for those of the trial court.

BLEED THROUGH

> acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.

199 U.S. at 533.

The *Trono* view of the sweeping, all-encompassing effect of the appealing defendant's waiver has subsequently been substantially restricted by two major Supreme Court decisions: *Green* v. *United States,* 355 U.S. 184 (1957), and *Ashe* v. *Swenson,* 397 U.S. 436 (1970).

In *Green,* the defendant had been charged with (i) committing arson by maliciously setting fire to a house and (ii) causing the death of an inhabitant of the house. At the first trial, the jury was instructed that, as to the second count, it could find him guilty of either first degree murder or second degree murder. The jury found him guilty of arson and of second degree murder, but it did not find him guilty of murder in the first degree. He was sentenced to one to three years' imprisonment on the arson count and to five to twenty years' imprisonment for murder in the second degree. Green then appealed and won a new trial on the ground that the verdict was not supported by sufficient evidence. On remand, he was retried, convicted of murder in the first degree, and sentenced to death.

The Supreme Court reversed, holding that the Double Jeopardy Clause barred the second prosecution for first degree murder. Rejecting the Government's argument that the "total waiver" theory of *Trono* v. *United States, supra,* controlled, the late Justice Black declared:

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in

> our society, one that was dearly won and one that should continue to be highly valued. *If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.*

355 U.S. at 198 (emphasis added). Although not explicitly overruling *Trono's* "total waiver" theory, the *Green* decision makes clear that the *Trono* opinion was not to be "extended beyond its peculiar factual setting," 355 U.S. at 197.

In *Ashe* v. *Swenson, supra,* this Court strengthened the safeguards of the Double Jeopardy Clause even further by holding that, as a matter of constitutional necessity, it embodied the doctrine of collateral estoppel. But even more important to the present appeal, this Court there sharply condemned prosecutorial refinement of a case upon retrial.

The defendant in *Ashe* had been accused of robbing six men who were engaged in a poker game. Ashe was first prosecuted for robbing one of the poker game participants, but the jury acquitted him on the ground of insufficient evidence. Six weeks later, Ashe was brought to trial again, this time for robbing another of the poker game participants, and was convicted. The United States Supreme Court granted certiorari and reversed, holding that the first jury's determination that Ashe had not been present at the robbery precluded the second prosecution. The Court, in an opinion by Justice Stewart, held that the Double Jeopardy Clause embodied the rule of collateral estoppel and that, since the issue of Ashe's presence at the robbery had been determined adversely to the prosecution in the first trial, the prosecution was precluded from

BLEED THROUGH

a second prosecution that hinged upon that same factual issue.

Noteworthy in the *Ashe* decision is this Court's concluding statement, a statement highly pertinent and relevant to the present case:

> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

397 U.S. at 447 (emphasis added). Although the factual circumstances of *Ashe* are, of course, different from those in the present case, the similarity of the Government's behavior in the present case to that behavior condemned in *Ashe* is striking. Here, the Government admittedly tried Ragano, won only a partial conviction, lost that conviction on appeal, and then completely recharacterized and rehabilitated its case for the second prosecution. Not content with a theory that the Fifth Circuit in *Ragano I* had explicitly held contained sufficient evidence to warrant conviction under original Count III, 476 F.2d at 413, the Government "refined" and rehabilitated its case in light of the events and facts disclosed at the first trial. Nor can *Ashe's* policy be distinguished on the ground that Ragano's conviction here on the original Count III in effect kept open the entire matter for prosecution. The Supreme Court's decision in *Green* v. *United States, supra,* makes clear that the *Trono* view of an unlimited waiver has been rejected.

The Double Jeopardy Clause must be held to preclude the Government from taking an exactly contrary view of the financial transaction or transactions in question, in the present series of prosecutions, after it has heard a defendant's defense to a particular prosecutorial theory. Otherwise, a criminal defendant will necessarily be inhibited from making a full defense at trial for fear that, if he is convicted and then wins a new trial on appeal, the prosecutor will be able to devise a new theory of criminal liability to counteract the already-presented defense. The Double Jeopardy Clause should, therefore, be applied to preclude the retrial of a defendant, after a successful appeal, on any theory and factual characterizations other than those that supported the reversed conviction.

Ragano here, by successfully appealing his conviction under original Count III, waived only his double jeopardy right not to be retried under that particular theory and that particular view of the facts for that particular offense. He did not consent, either explicitly or implicitly, to be retried under a new, rehabilitated prosecutorial theory that entailed an interpretation of the facts contrary to the interpretation put forward by the Government in the first trial.

C. The "Same Transaction" Or "Same Criminal Episode" Test For Double Jeopardy Barred The Government From Reprosecuting Ragano Under A Different Legal Theory.

Instead of reprosecuting Ragano under original Count III, which it certainly had the right to do, the Government dismissed that indictment and charged him with five counts, including a conspiracy count, that enabled it to assert that the various stock transactions

BLEED THROUGH

were a sham. The conspiracy count was the critical count in the reprosecution; the alleged conspiracy was one designed to disguise the payment of the alleged finder's fee. Thus, the alleged conspiracy was integral to the Government's new, rehabilitated theory of prosecution.

The "same transaction" test for defining "offense" under the Double Jeopardy Clause bars the Government from prosecuting defendants, such as Ragano, under new and different theories of criminal liability. The "same transaction" test for double jeopardy, as advocated by Justice Brennan in his concurring opinion in *Ashe* v. *Swenson, supra,* would require "the prosecution, except in the most limited circumstances, (footnote omitted), to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." 397 U.S. at 453-54. Justices Marshall and Douglas endorsed Justice Brennan's view, but the late Justice Harlan expressly disavowed it. A majority of this Court, to this date, has neither accepted nor rejected it. Nevertheless, in the view of Justice Schaefer of the Illinois Supreme Court, the failure of the majority in *Ashe* to adopt the "same transaction" test can in no way be read as a rejection of that view. The Court decided *Ashe* upon the narrowest possible ground, in accord with sound judicial policy. Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe,* 58 Cal. L. Rev. 391 (1970).

The "same transaction" test has been approved by both the American Law Institute's Model Penal Code and the American Bar Association's Minimum Standards for Criminal Justice Relating to Joinder and Sev-

erance. Section 1.07(2) of the Model Penal Code provides:

> [A] person shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of commencement of the first trial.

Model Penal Code § 107(2) (Proposed Official Draft 1962). Similarly, the ABA Minimum Standards require compulsory joinder of related offenses that "are based upon the same conduct or arise from the same criminal episode." ABA Minimum Standards for Criminal Justice, Joinder and Severance 1.1, 1.3 (Approved Draft 1968). *See also* Final Report of the National Commission on the Reform of Federal Criminal Laws: A Proposed New Federal Criminal Code §§ 703-706 (1971). The collective opinions and recommendations of these prestigious legal institutions cannot lightly be ignored.

The "same transaction" test, although long and vigorously advocated by critics of the present system of permissive joinder,[7] is not merely an intellectual figment, untried in the "real world." To the contrary, a number of states presently apply, both statutorily and through case law, the protections accorded by the "same transaction" test. *See* Note, *Twice In Jeopardy,*

---

[7] *E.g.*, R. Arguile, Criminal Procedure 115-16 (1969) ("Where, therefore, offenses may be joined, they ought to be joined"); G. Bower, the Doctrine of Res Judicata 281 (2d ed. A. Turner 1969) ("[T]he prosecutor is always to combine in one indictment all the charges which he intends to prefer, arising out of one transaction:).

BLEED THROUGH

75 Yale L.J. 262, 275ns. 60-62 (1965); Cal. Pen. Code § 654 (West Supp. 1975); Ill. Rev. Stat. c. 38, §§ 3-3, 3-4(b)(1) (1975). Moreover, England has abolished its restrictive view of double jeopardy and has adopted a rule of compulsory joinder of all known criminal offenses in the initial prosecution. *See Connelly* v. *Director of Public Prosecutions,* (1964) A.C. 1254. In the *Connelly* decision, Lord Devlin made it clear that, in addition to curbing the potential for abusive reprosecutions, the House of Lords had another public policy in mind in adopting a rule of compulsory criminal joinder: the courts must conduct their proceedings so as to command the respect and confidence of the public, so it is absolutely necessary that issues of fact that are substantially the same be, whenever practicable, tried by the same tribunal at the same time.

The United States Congress has recently enacted a statutory version of the "same transaction" compulsory joinder rule in the Speedy Trial Act of 1974, P.L. 93-619 (January 3, 1975), 18 U.S.C. § 3161(d). Section 3161(d) provides:

> (d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offenses or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

18 U.S.C. § 3161(d). Accordingly, Section 3161(d) specifically provides, in effect, for a compulsory joinder of all offenses "based on the same conduct or arising from the same criminal episode . . . ."

The "same transaction" test, implemented by the procedural rule of compulsory joinder of all known offenses, has found widespread acceptance in all but the federal courts. Hence, this Court should hold that the Government, on the facts of this case, exceeded the constitutional limitations on its prosecutorial powers when it reindicted and retried Ragano under an entirely new theory based upon substantially the same evidence presented at the first trial, and this Court should not permit the conspiracy count conviction to preclude such a determination. Under the "same transaction" or "same criminal episode" definition of "offense," the Government was barred from reprosecuting Ragano under any charge save Count III of the original indictment.

II. The Due Process Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

In retrying Ragano under a prosecutorial theory diametrically opposed to that employed in the first trial, the Government's conduct contravened the Due Process Clause of the Fifth Amendment to the United States Constitution. Such conduct violated Ragano's constitutional right to be prosecuted according to our criminal justice system's norm of "fundamental fairness". *See Blackledge* v. *Perry,* U.S. 94 S.Ct. 2098 (1974). In that decision, this Court made very clear that the Due Process Guarantees prevent prosecutors from "upping the ante" riding on a criminal

BLEED THROUGH

defendant's appeal. Here, Ragano sought and won a reversal of his conviction under Count III of the original indictment. Faced with genuine difficulties (but of its own making) with retrying Ragano under Count III, the Government resurrected the trial theory originally recommended by the IRS investigating agents. At no time did the Government attempt to justify why it should have been permitted to reject the theory of the first trial and substitute the originally recommended theory. The Government should not be permitted to argue opposing theories of its case without being required to demonstrate a compelling reason for such a switch, and the Due Process Clause of the Fifth Amendment to the United States Constitution should be read and applied to require the Government to demonstrate such a compelling reason.

III. The District Court Erred in Denying Ragano's Motion for a Directed Judgment of Acquittal.

At both the close of the Government's case and the close of his defense, Ragano timely moved for a directed judgment of acquittal. These motions were denied.

The Government, in its subsequent prosecutions of Ragano, has advanced two different, separate, distinct, and factually inconsistent theories of criminal liability. In *Ragano I,* the Government conceded that Ragano acquired the shares of Two Seasons, Inc., as part of a *bona fide* transaction; the thrust of its theory of criminal liability was that, although the shares were actually acquired by Ragano, the acquisition of the stock should have been treated by Ragano as income in 1967 and, therefore, upon the sale of the stock in 1968, there should have been no gain or loss recorded. In *Ragano II,* however, the Government "reversed its field" and charged that the stock acquisition was a "sham", intended to evade proper taxation on the alleged finder's

fee. Thus, on the same facts, the Government took two diametrically contrary views of the transaction or transactions in question. By first prosecuting Ragano under a theory that conceded the validity of the acquisition of the shares of Two Seasons, Inc., the Government, in effect, conceded for the record that a strong probability existed that a jury could find that the acquisition of the shares was a *bona fide* transaction. Yet, in the second Prosecution, the Government charged that the acquisition of the shares was, in fact, not *bona fide*. Rather, the Government contended that the acquisition was part of a sham transaction. Obviously, as the Government's multiple indictments and prosecutions show, the facts of the present case give rise to at least two equally credible hypotheses, both inconsistent on the factual basis of guilt. To say, as did the Fifth Circuit in rejecting Ragano's contention that he was entitled to a directed verdict of acquittal, that both characterizations lead to hypotheses of guilt, misses the point; here, both characterizations cannot *simultaneously* support hypotheses of guilt.

In light of the Government's admittedly inconsistent treatment of the critical facts involved in Ragano's multiple prosecutions, it is clear that the inconsistency of *Ragano I* with *Ragano II* requires that Ragano's conviction under the indictment in *Ragano II* be reversed and remanded with directions to the District Court to enter a judgment of aquittal. Where the Government takes inconsistent factual and legal positions in subsequent prosecutions of the same criminal defendant, it should not be permitted to argue that, although both theories are inconsistent, nevertheless, both point toward guilt. Such an argument is, in effect, pleading in the alternative, the inescapable result of which is that the Government has conceded from the outset that the stock transactions were, in all probability, valid.

BLEED THROUGH

CONCLUSION

This Petition for Certiorari presents several related issues, but underlying each of these issues is the fundamental question of the extent to which the Government may, upon retrial, reopen previously-decided questions. Nowhere in its opinion did the Fifth Circuit confront the inescapable inconsistency and conflict between the Government's initial and subsequent theories of Ragano's criminal liability. By affirming Ragano's conviction, the Fifth Circuit implicitedly sanctioned such prosecutorial tactics. Yet the Fifth Circuit's sole comment was:

> So restricting the prosecution from proceeding upon a new legal theory at retrial would erode severally the gold served by permitting retrial of a criminal defendant after the reversal of a conviction.

520 F.2d 1198.

Nowhere did the Fifth Circuit discuss the propriety, let alone the desirability, of such prosecutorial behavior. Accordingly, the real issues of the present case remains undiscussed and unresolved.

In *Ragano I,* the Government characterized the financial transactions in one way; in *Ragano II,* it advocated a precisely contrary characterization. In *Ragano I,* the Government prosecuted Ragano for attempted tax evasion on the alleged finder's fee and lost; in *Ragano II,* the Government rehabilitated its prosecution by charging Ragano, under a new theory of criminal liability, with attempted tax evasion for two different years. The result, of course, is that Ragano's previous acquittal for tax evasion for the year 1967 has been rendered meaningless; and this result, no matter how the Government may seek to justify it, is forbidden by the

Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Apart from its "new" rehabilitated theory of criminal liability, the Government also reprosecuted Ragano under a different characterization of the facts. In *Ragano I*, the shares of Two Seasons, Inc., stock were concededly transferred and Ragano was considered a *bona fide* shareholder. In *Ragano II*, however, the Government flip-flopped and contended that the so-called transfer was but a "sham". In so doing, however, the Government has conceded that a jury could just as easily find a *bona fide* transfer as find a "sham". Given these opposite characterizations of the facts by the Government, it should be precluded from contending that either characterization is more likely to be true.

Finally, the Government's retrial of Ragano under this different, inconsistent prosecutorial theory violated his constitutional right to be prosecuted with "fundamental fairness", in contravention of the Due Process Clause of the Fifth Amendment to the United States Constitution.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

E. DAVID ROSEN, ESQUIRE
Suite 130 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

THOMAS T. STEELE, ESQUIRE, of
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida

Attorneys for Petitioner

BLEED THROUGH